Supreme Court, U.S.
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No. 14-280

IN THE SUPREME COURT OF THE UNITED STATES

HENRY MONTGOMERY,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

On Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Did *Miller v. Alabama*, 132 S. Ct. 2455 (2012) adopt a new substantive rule that applies retroactively to cases on collateral review?

2. Does this Court have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to this Court's decision in *Miller v. Alabama*?

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OPINIONS BELOW

The decision of the Louisiana Supreme Court is reported at 2013-1163 (La. 6/20/14); 141 So.3d 264 and appears at App. 3 of the Petition for Writ of Certiorari. The Writ Application Transfer filed with the Louisiana First Circuit Court of Appeal and transferred to the Louisiana Supreme Court is unpublished and found at J.A. 132. The ruling from the Louisiana Nineteenth Judicial District Court appears at App. 1 of the Petition for Writ of Certiorari.

JURISDICTION

As discussed in detail in Section III, *infra*, this Court has jurisdiction under 28 U.S.C. § 1257(a). The Louisiana Supreme Court's decision was entered June 20, 2014. The petition for certiorari was filed on September 5, 2014.

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law

> which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III of the United States Constitution provides in pertinent part:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.
>
> * * *
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.

The Supremacy Clause of Article VI of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the

> Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

In November 1963, more than a half century ago, Henry Montgomery, a 17-year-old eleventh-grade student, was arrested for the murder of Sheriff Deputy Charles Hurt in East Baton Rouge, Louisiana. Against the backdrop of racial tension and turmoil that included reported cross burnings,[1] Mr. Montgomery, a black youth,[2] was tried and convicted for the murder of the white law enforcement officer. Mr. Montgomery automatically received the death penalty. The capital statute under which he was tried was a "unitary" capital punishment scheme which included no sentencing phase before either a judge or jury. Mr. Montgomery therefore had no opportunity to present any evidence – and certainly no evidence regarding his age and relevant attributes – in

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[1] *See* J.A. 17-19; *State v. Montgomery*, 181 So. 2d 756, 760 (La. 1966) (noting that a week before the start of Mr. Montgomery's trial, a local Baton Rouge paper carried an article saying that "[i]n Baton Rouge, an anonymous caller told the [local newspaper] the burning crosses signaled a reactivation of the Klan in that area. The caller said 100 crosses would be burned."); *State v. Montgomery*, 242 So. 2d 818 (La. 1970).

[2] Though a teenager, the grand jury indictment and media coverage repeatedly referred to Mr. Montgomery as "Wolfman." *See Montgomery*, 181 So. 2d at 758. *See also* Jim Crain, *Negro Admits Panic During Slaying of BR Deputy*, Baton Rouge Morning Advocate, Nov. 15, 1963, at 1-A (describing Mr. Montgomery as "[a] Negro student – known as 'Wolf Man'").

mitigation of his sentence.[3]

In 1966, Mr. Montgomery's original conviction and sentence of death were overturned by the Louisiana Supreme Court. *State v. Montgomery*, 181 So. 2d 756, 762 (La. 1966). In vacating the verdict, that court relied on evidence that Mr. Montgomery's trial started on the newly announced "Charles Hurt Memorial Day" and reported reactivation of Ku Klux Klan activity in the week before the start of the trial. *Id.* at 758-60, 762. That Court found: "We are constrained to conclude that the feelings which existed prior to trial permeated the atmosphere and prejudiced the defendant.... [N]o one could reasonably say that the verdict and the sentence were lawfully obtained." *Id.* at 762.

In 1969, Mr. Montgomery was retried under a modified version of Louisiana's unified capital punishment scheme which again offered no opportunity for the presentation of evidence in mitigation of sentence. This Court described the Louisiana capital statute employed in Mr.

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[3] *See* La. Rev. Stat. Ann. § 14:30 (1963) ("Whoever commits the crime of murder shall be punished by death."). *See also Witherspoon v. Illinois*, 391 U.S. 510, 525 n.4 (1968) (referencing Louisiana's murder statute in explaining that "[i]n other States, death is imposed upon a conviction of first degree murder unless the jury recommends mercy or life imprisonment"); *U.S. ex rel. Mullen v. Henderson*, 312 F. Supp. 1363, 1367 (E.D. La. 1970) ("Under Louisiana law, whoever commits the crime of murder shall be punished by death, LSA-R.S. 14:30, except that the jury may qualify its verdict of guilty with the words 'without capital punishment' in which case the punishment is imprisonment at hard labor for life."), *aff'd*, 467 F.2d 899 (5th Cir. 1972).

Montgomery's second trial:

> Before the [1973] amendments, Louisiana law defined the crime of "murder" as the killing of a human being by an offender with a specific intent to kill or to inflict great bodily harm, or by an offender engaged in the perpetration or attempted perpetration of certain serious felonies, even without an intent to kill. The jury was free to return any of four verdicts: guilty, guilty without capital punishment, guilty of manslaughter, or not guilty.

Roberts v. Louisiana, 428 U.S. 325, 328-29 (1976) (plurality opinion) (footnotes omitted) (citing La. Code Crim. Proc. Ann. art. 814 (1967)).

When the jury returned a verdict of "guilty without capital punishment," Mr. Montgomery received a mandatory life without parole sentence for an offense committed when he was a juvenile. J.A. 1. On appeal, the Louisiana Supreme Court affirmed his conviction and sentence. *State v. Montgomery*, 242 So. 2d 818, 820 (La. 1970).

In spite of ample available evidence suggesting that his young age and related characteristics mitigated against a sentence of life without possibility of parole, state law precluded Mr. Montgomery from receiving an individualized sentencing hearing at which a judge or jury could consider such mitigating evidence in determining an appropriate and proportionate sentence. As the sentence was

automatic upon the determination of guilt, no sentencer could give effect to the circumstances of the offense, including evidence that as a scared youth, Mr. Montgomery "shot in panic as the officer confronted him playing hooky," as mitigating the sentence. *Sanity Hearing Sought in BR Murder Case*, Baton Rouge State-Times, Dec. 18, 1963, at 8-D. Evidence about Mr. Montgomery's age-appropriate immaturity, recklessness, and judgment also were not taken into account for sentencing purposes. Even without the benefit of modern adolescent development research, experts characterized Mr. Montgomery in terms identical to what the modern research has confirmed. They testified that Mr. Montgomery "demonstrate[d] an 'inability to plan ahead, little foresight, low self control, low self discipline, and very little ability to make judgments.'" *Accused Slayer of Deputy Has Low I.Q., Two Testify*, Baton Rouge State-Times, Feb. 8, 1969, at 8-A. *See Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012) (noting children's "immaturity, impetuosity, and failure to appreciate risks and consequences"). Moreover, experts moreover testified that Mr. Montgomery's intelligence was "borderline," with an IQ "somewhere in the 70's." *Id.* In the 1960's, this evidence could be considered only with regard to *mens rea* rather than in a sentencing proceeding in which an appropriate and proportionate sentence could be determined.

The mandatory sentence also precluded the sentencer from considering Mr. Montgomery's "family and home environment...." *See Miller*, 132 S. Ct. at 2468. Available testimony indicated that Mr. Montgomery suffered from "love deprivation" and lacked proper parental relationships as he "regarded

his mother as an 'older sister.'" Jim Crain, *Death Trial Jury Retires Without Reaching Verdict*, Baton Rouge Morning Advocate, Feb. 4, 1964, at 4-A. Nor could a sentencer consider how Mr. Montgomery's "incompetencies associated with youth" in dealing with the adult criminal justice system, such as "his inability to deal with police officers," *Miller*, 132 S. Ct. at 2468, may have contributed to the serious charges and his ultimate conviction. *See, e.g., State v. Montgomery*, 181 So. 2d 756, 575 (1966) (noting defense counsel's complaints that Mr. Montgomery's "alleged confessions were coerced" and that Mr. Montgomery was not provided counsel when his confessions were elicited). Finally, the sentencer was precluded from considering "the possibility of rehabilitation even when the circumstances most suggest it." *Miller*, 132 S. Ct. at 2468.

Evidence also indicates that Mr. Montgomery has indeed been rehabilitated. As an immature youth entering the notoriously oppressive, corrupt and violent adult Louisiana farm-labor punishment system,[4] Mr. Montgomery originally struggled with his adjustment to prison. In his more than fifty years in that system, Mr. Montgomery, now 69 years old, has grown and matured. J.A. 19-20. Even without hope of release, he has served as a coach and trainer for a boxing team he helped establish, has worked in the prison's silkscreen department, and strives to be a positive role model and counselor for other inmates. J.A. 20.

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[4] *See Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977) (holding that the totality of the conditions at Angola, including the prevalence of rapes and stabbings among inmates, overcrowding, and safety hazards, violated the Eighth Amendment).

On June 25, 2012, this Court provided Mr. Montgomery with hope that his mandatory sentence of life without possibility of parole might be reconsidered. In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), this Court held that "mandatory life without parole for those under the age of 18 at the time of their crime violates the Eighth Amendment's prohibition on 'cruel and unusual punishment.'" *Id.* at 2460. On July 13, 2012, in light of this substantive change in the law, Mr. Montgomery filed a *pro se* motion to correct an illegal sentence in the East Baton Rouge Parish District Court. J.A. 8-32. The State of Louisiana objected to Mr. Montgomery's motion, arguing that *Miller* does not apply retroactively to cases on collateral review. J.A. 45-57. On January 30, 2013, the district court denied Mr. Montgomery's motion. *See* App. 1 of the Petition for Writ of Certiorari. Mr. Montgomery filed an application for a supervisory writ in the State of Louisiana First Circuit Court of Appeal on March 20, 2013. J.A. 3, 89. On May 20, 2013, the Court of Appeals transferred the writ application to the Louisiana Supreme Court. J.A. 3, 132.

While Mr. Montgomery's application was pending, a divided Louisiana Supreme Court held in another case that "*Miller* does not apply retroactively to cases on collateral review as it merely sets forth a new rule of criminal constitutional procedure, which is neither substantive nor implicative of the fundamental fairness and accuracy of criminal proceedings." *State v. Tate*, 130 So. 3d 829 (La. 2013), *cert. denied*, 134 S. Ct. 2663 (2014). The court noted that "the standards for determining retroactivity set forth in *Teague v.*

Lane, 489 U.S. 288 (1989), apply to 'all cases on collateral review in our state courts.' Accordingly, our analysis is directed by the *Teague* inquiry." *Id.* at 834 (quoting *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296 (La. 1992)). Adhering to *Tate*, the Louisiana Supreme Court denied Mr. Montgomery's claim of unconstitutional confinement. *State v. Montgomery*, 141 So. 3d 264 (La. 2014). The Louisiana Supreme Court's Chief Justice dissented, finding that "*Miller* announced a new rule of criminal procedure that is substantive and consequently should apply retroactively." *Id.* at 265 (Johnson, C.J., dissenting).[5]

Mr. Montgomery timely filed a petition for writ of certiorari in this Court. This Court granted review and ordered the parties to address two questions: (1) whether *Miller* adopts a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison and (2) whether this Court has jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect to *Miller v. Alabama*.

SUMMARY OF ARGUMENT

In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), this Court held that the mandatory imposition of life without parole sentences on juvenile offenders convicted of murder is cruel and unusual punishment.

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[5] Justice Hughes joined Chief Justice Johnson's dissenting opinion, which concluded that *Miller* must be applied retroactively under *Teague* because it both announced a new substantive rule of constitutional criminal procedure and established a watershed rule of criminal procedure. *Tate*,130 So. 3d at 847 (Johnson, C.J., dissenting).

Because *Miller* held that a category of punishment (mandatory life without parole sentences) cannot be imposed on a category of defendants (juvenile offenders), *Miller* created a substantive rule that must apply retroactively to cases on collateral review. The determination that a particular sentence, at least for a particular class of defendants, is "cruel and unusual" is an inherently substantive determination.

Moreover, by insisting upon a discretionary sentencing scheme for juveniles convicted of homicide, this Court required states to expand the range of sentencing options for these juvenile offenders. This Court also articulated specific factors that a sentencer must consider, at a minimum, before imposing a discretionary life without parole sentence. These two components of the Court's decision further establish the substantive nature of the ruling. Finally, assuming *arguendo* the rule is procedural, *Miller* is a watershed rule of criminal procedure that applies retroactively as it marks a foundational shift in our understanding of appropriate, proportionate, and constitutional sentencing for juvenile homicide offenders.

Additionally, this Court has jurisdiction to consider Mr. Montgomery's claim that he is incarcerated in violation of the U.S. Constitution. The Louisiana Supreme Court's decision to bar consideration of Mr. Montgomery's constitutional claim, by holding that *Miller* does not apply retroactively, was based solely on federal law; no adequate and independent state ground for proscribing retroactive application of *Miller* was asserted. Contrary to the argument of Amicus Against

Jurisdiction, the fact that Louisiana *could* have applied a state law retroactivity analysis, but chose not to, does not alter the fundamentally federal basis for the decision below. Furthermore, this Court's ruling in *Miller* establishes a minimum standard for the state sentencing of juvenile offenders under the Eighth and Fourteenth Amendments. Accordingly, although the Louisiana Supreme Court may justify extending retroactivity of an otherwise non-retroactive decision of this Court as a matter of state law, it cannot deny retroactivity to claims under *Miller*. *Miller* sets a federal constitutional sentencing standard below which the state may not go. This Court therefore has jurisdiction to review the Louisiana Supreme Court's decision.

ARGUMENT

I. *MILLER V. ALABAMA* APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW

This Court's Eighth and Fourteenth Amendment jurisprudence with respect to juvenile sentencing has evolved significantly over the past thirty years. In 1989, this Court held that the death penalty for juveniles aged 16 and older was constitutionally permissible. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989). *Compare Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (execution of those 15 or younger at the time of the crime violates the Eighth Amendment). In 2005, this Court revisited *Stanford* and ruled that, because of the distinctive developmental attributes of youth, the Eighth Amendment barred the execution of all juveniles younger than 18 at the time of the

offence. *Roper v. Simmons*, 543 U.S. 551 (2005).[6] Less than a decade later, this Court extended *Roper* to ban the practice of punishing children with a mandatory sentence of life without parole. *Miller*, 132 S. Ct. at 2469. This evolving Eighth Amendment jurisprudence has been informed by brain science, behavioral research, youth's distinctive capacity for rehabilitation and the recognition that the developmental differences between children and adults have constitutional significance in sentencing.

Mr. Montgomery remains incarcerated based upon a constitutionally disproportionate sentence that could not be imposed today. *See Miller*, 132 S. Ct. at 2475 (finding "the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment"). The developmentally distinct characteristics of youth and their relevance to sentencing were not incorporated into Eighth Amendment jurisprudence when Mr. Montgomery's direct appeal rights were exhausted in 1970. *See State v. Montgomery*, 242 So. 2d 818 (1970). But he is not more morally culpable merely because his case became final prior to *Miller*, and he does not deserve to die in prison without consideration of the unique attributes of youth prior to sentencing simply because he was convicted more than fifty years ago.

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[6] This Court has also recognized the constitutional significance of youth outside the context of sentencing. *See, e.g., J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (holding that age must be considered in determining whether a child is in police custody for the purposes of the custody analysis required by *Miranda v. Arizona*, 384 U.S. 436 (1966)).

This Court's precedent requires that *Miller* be applied retroactively. Relief from unconstitutional confinement should not turn on a particular date on the calendar. This principle of justice is especially compelling with regard to the Eighth Amendment's ban on cruel and unusual punishments. As Justice Harlan wrote: "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring). This Court's decisions interpreting the Eighth Amendment mark our nation's progress as a civilized society. *See Trop v. Dulles*, 356 U.S. 86 (1958). Once the Court sets down a new substantive marker of that progress, the lingering effects of previous denials of the constitutional right should be rectified. To deny retroactive application of *Miller* would compromise the ability of this Court to fulfill these core jurisprudential principles and to speak as the premier voice of constitutional interpretation.

A. *Miller* Announced A New Rule That Applies Retroactively Pursuant To *Teague v. Lane*

The current test for determining when a new rule of federal constitutional law will be applied to cases on collateral review of state convictions was set forth in *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion). This Court held that while new rules should always be applied retroactively to cases on direct review, new rules set forth by this Court would only apply retroactively to cases on collateral review in certain circumstances. *Teague*, 489 U.S. at 307, 311.

This Court recognized two circumstances when retroactive application of a new constitutional rule is required: when the new rule is (a) a substantive rule; or (b) a "watershed" rule of criminal procedure. *See Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004).

Substantive rules include:

> decisions that narrow the scope of a criminal statute by interpreting its terms, *see Bousley v. United States*, 523 U.S. 614, 620-21 (1998), as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the state's power to punish, *see Saffle v. Parks*, 494 U.S. 484, 494-95 (1990); *Teague v. Lane*, 489 U.S. 288, 311 (1989) (plurality opinion). Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him. *Bousley, supra*, at 620 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

Summerlin, 542 U.S. at 351-52. Substantive rules are those that "deprive[] the State of the power to impose a certain penalty" as well as those that deprive the state of the "power to punish at all." *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *overturned in part by Atkins v. Virginia*, 536 U.S. 304 (2002).

New *procedural* rules, conversely, generally do not

apply retroactively because they "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Summerlin*, 542 U.S. 345 at 352. However, this Court has made an "exception for 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (quoting *Teague*, 489 U.S. at 311). "[I]mplicit in the retroactivity approach [adopted in *Teague*], is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules [would apply] retroactively to *all* defendants on collateral review...." *Teague*, 489 U.S. at 316.[7]

Because *Miller* announced a new substantive rule or, in the alternative, a "watershed" procedural rule, the constitutional prohibition on mandatory life without parole sentences for juveniles must apply retroactively.

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[7] This Court's decision in *Miller* provided immediate relief to two juveniles, Evan Miller, petitioner in *Miller*, and Kuntrell Jackson, the petitioner in *Miller*'s companion case, *Jackson v. Hobbs*, whose case was on collateral review. *Miller*, 132 S. Ct. at 2461. Because the new rule announced in *Miller* was applied to Mr. Jackson on collateral review, Mr. Montgomery should likewise benefit from this Court's ruling in *Miller*. *See Teague*, 489 U.S. at 300 (finding that that "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated"). *See also Tyler v. Cain*, 533 U.S. 656, 668 (2001) (O'Connor, J., concurring) (explaining that the Supreme Court need not expressly hold new rule to be retroactive, but retroactivity may be "logically dictate[d]" by the Court's holdings).

1. *Miller* Is Retroactive Because It Announces A New Substantive Rule Which Alters The Range Of Available Sentencing Options

This Court has held that "[n]ew *substantive* rules generally apply retroactively." *Summerlin*, 542 U.S. at 351. A new rule[8] is "substantive" if it "alters the range of conduct or the class of persons that the law punishes." *Id.* at 353. Moreover, a rule is substantive if it "'prohibit[s] a certain category of punishment for a class of defendants because of their status or offense.'" *Saffle*, 494 U.S. at 494 (quoting *Penry*, 492 U.S. at 329). While procedural rules merely alter the methods of choosing between extant sentencing options, substantive rules *change* the underlying sentencing options or outcomes. *Miller* applies retroactively because it prohibits a "category of punishment" (mandatory life without parole) for a "class of defendants" (juveniles), thus mandating a change in the statutory sentencing options available *ab initio* before any sentencing procedural rules come into play. *See id.*

Mandatory life without parole sentences are substantively distinct and harsher than a discretionary life without parole sentence. The former gives the sentencer and the defendant only one choice regardless of the circumstances of the offense or unique characteristics of the defendant. Because of

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[8] There is no dispute that the rule announced in *Miller* is a new rule. *See* Respondent's Brief in Opposition to Petition for Certiorari, at 10.

this, a mandatory sentence of life without possibility of parole is more likely to be disproportionate and in error. A discretionary sentencing scheme, however, provides for consideration of factors that enable the sentencer to impose a sentence that is proportionate to the circumstances of the crime and the characteristics of the offender.

This Court has stated that "[m]andatory minimum sentences increase the penalty for a crime," and found it "impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Alleyne v. United States*, 133 S. Ct. 2151, 2155, 2160 (2013). As this Court explained, "[e]levating the low-end of a sentencing range heightens the loss of liberty associated with the crime." *Id.* at 2161. Accordingly, a mandatory life without parole sentence for a juvenile – which plainly elevates the low end of the sentencing range to the absolute maximum allowed under the Constitution – is substantively different from non-mandatory options; it is harsher, more aggravated, and imposes a heightened loss of liberty. *Miller* requires that juveniles be afforded an *expanded* range of sentencing options by prohibiting *mandatory* life without parole punishments.

In striking mandatory life sentences without parole, *Miller* invalidated state sentencing statutes, including Louisiana's, which provided for only this single punishment upon conviction. The constitutional ban on such mandatory sentences for juveniles requires states, post-*Miller*, to afford alternative punishment options to sentencers. Unlike procedural rules, which "regulate only the *manner of determining* the defendant's culpability", *Summerlin*,

542 U.S. at 353, *Miller* imposes a fundamental, substantive change in the sentencing range for juveniles.[9] Therefore, like *Roper* and *Graham v. Florida*, 560 U.S. 48 (2010), which likewise expanded or altered the sentencing range for juveniles and have been held retroactive, *Miller* should be applied

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[9] State legislative responses to *Miller* demonstrate the expansion of sentencing options once mandatory life without parole is eliminated. Because of *Miller*, the Louisiana Legislature amended sentencing laws for juveniles convicted of both first and second degree murder. Louisiana now allows juveniles sentenced to life with the opportunity for parole to first apply for parole after serving 35 years of their sentence. La. Stat. Ann. § 15:574.4(E) (2015). Mr. Montgomery has served nearly 52 years in prison. Moreover, a Louisiana district court must now conduct an individualized sentencing hearing before imposing this sentence. La. Code Crim. Proc. Ann. art. 878.1 (2013). The court must consider mitigation evidence relevant to the charged offense or the defendant's character, including, but not limited to, facts and circumstances of the crime, his level of family support, social history and other factors the court may deem relevant. *Id.* Under the act, "sentences imposed without parole eligibility should normally be reserved for the worst offenders and the worst cases." *Id.*

Louisiana is not the only state whose legislature enacted substantive changes because of *Miller*. In addition to states like Louisiana that have narrowed the parameters for juvenile life without parole eligibility, at least nine states have passed legislation that completely eliminates juvenile life without parole since *Miller*. *See, e.g.*, 2015 Conn. Acts 15-84 (Reg. Sess.); Del. Code Ann. tit. 11, § 4204A(d)(1) (2013); Haw. Rev. Stat. § 706-656 (2014); Mass Gen. Laws Ann. ch. 279, § 24 (2014); Nev. Rev. Stat. Ann. § 176.025 (2015); Tex. Penal Code Ann. § 12.31 (2013); Vt. Stat. Ann. tit. 13, § 7045 (2015); W. Va. Code Ann. § 61-11-23 (2014); Wyo. Stat. Ann. § 6-2-101(b) (2013) (providing mechanism for juveniles serving life without opportunity for parole and other lengthy sentences to seek resentencing); *Wyoming v. Mares*, 335 P.3d 487 (2014) (holding that Wyoming statute applies retroactively).

retroactively. *See* Section I.A.4., *infra*.

2. *Miller* Is Retroactive Pursuant To *Teague* Because It Establishes A Substantive Right To Individualized Sentencing For Juveniles Facing Life Without Parole

In addition to requiring an expansion of the range of sentencing options, *Miller* also established a new rule requiring individualized sentencing for juvenile homicide offenders facing life without parole. *See Miller*, 132 S. Ct. at 2466 n.6 ("*Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses.").

This Court's jurisprudence requiring individualized sentencing in capital cases is instructive to the *Miller* retroactivity analysis. For example, in *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion), *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion), and *Sumner v. Shuman*, 483 U.S. 66 (1987), this Court held that a mandatory death penalty was a violation of the Eighth Amendment because it did not permit the sentencer to weigh appropriate factors in determining the proper sentence. "The mandatory death penalty statute in *Woodson* was held invalid because it permitted *no* consideration of 'relevant facets of the character and record of the individual offender or the circumstances of the particular offense.'" *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (quoting *Woodson*, 428 U.S. at 304). This Court stated that "the

fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a *constitutionally indispensable* part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304 (emphasis added) (internal citation omitted). *See also Lockett*, 438 U.S. at 605, 608 (1978) ("[W]e cannot avoid the conclusion that an individualized decision is *essential* in capital cases. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.") (emphasis added). *See also Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982) (requiring state courts to consider all mitigating evidence before imposing the death penalty; the Court specifically found that "just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing").

Critically, *Lockett* differentiates between the substantive right to individualized sentencing that is required under the Eighth Amendment and the specific procedures states adopt in implementing such individualized sentencing schemes:

> *There is no perfect procedure* for deciding in which cases governmental authority should be used to impose death. *But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's* character and record and to

> circumstances of the offense creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

Lockett, 438 U.S. at 605 (emphasis added). The right to individualized sentencing is therefore a constitutionally mandated prerequisite to the imposition of the death penalty, even though states' actual sentencing procedures may vary.

The reasoning of these capital cases applies to mandatory juvenile life without parole sentences. *Miller* found:

> By removing youth from the balance – by subjecting a juvenile to the same life-without-parole sentence applicable to an adult – these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender.

132 S. Ct. at 2466. Since *Miller* holds that life without parole sentences for juveniles are "akin to the death penalty," 132 S. Ct. at 2466, *Miller*'s new requirement of individualized sentencing for youth facing life without parole is, as in the death penalty cases, "constitutionally indispensable" and "essential." *See Woodson*, 428 U.S. at 304; *Lockett*, 438 U.S. at 605.

Like a mandatory sentence of death, a mandatory juvenile life without parole sentencing scheme "creates the risk that [the sentence] will be imposed in

spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 605. *See Summerlin*, 542 U.S. at 352 (new substantive "rules apply retroactively because they 'necessarily carry a significant risk that a defendant' faces a punishment that the law cannot impose upon him." (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998))).

3. *Miller* Is Substantive Pursuant To *Teague* Because It Requires The Sentencer To Consider Specific Factors Before Sentencing Juveniles To Life Without Parole

To ensure that the sentencing of juveniles is constitutionally appropriate, *Miller* identified a cluster of factors relevant to the youth's diminished culpability and heightened capacity for rehabilitation that, at a minimum, must be considered by the sentencer. 132 S. Ct. at 2468-69. These relevant factors include: (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation." *Id.* *Miller* therefore requires the sentencer to make a substantive, individualized assessment of the juvenile's moral

culpability prior to imposing life without parole. *Id.*

This Court's requirement that sentencers consider a range of factors before imposing a sentence of life without parole on a juvenile further establishes that the *Miller* rule is substantive. This Court's ruling in *Summerlin*, denying retroactive effect to *Ring v. Arizona*, 536 U.S. 584 (2002), is instructive. *Ring* held that the Sixth Amendment requires that a *jury* find the statutory prerequisite aggravating factors necessary to the imposition of the death penalty. *Summerlin* distinguished between *procedural* rules, where this Court determines the manner in which previously established factors must be considered before a particular sentence can be imposed, and *substantive* rules, where this Court establishes that certain factors are required before imposition of a particular sentence:

> [The United States Supreme] Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as [*the U.S. Supreme*] *Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.

542 U.S. at 354 (emphasis added). Because *Miller* requires the sentencer "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," *Miller*, 132 S. Ct. at 2469, this Court has made consideration of certain factors

"essential" to imposing life without parole on juveniles; in the absence of establishing these factors, a sentence of life without parole cannot be imposed and an alternative sentence must be available. Following the reasoning in *Summerlin*, *Miller* created a new substantive rule.

Moreover, *Miller* made clear that the rule announced was not a mere procedural checklist, but a substantive shift in what constitutes permissible juvenile sentencing under the Constitution. This Court found:

> [G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.* Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, *we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.*

132 S. Ct. at 2469 (emphasis added). This Court's finding that appropriate occasions for juvenile life without parole sentences will be "uncommon," combined with its requirement that the sentencer consider the child's developmental attributes before imposing a sentence of life without parole, underscores the substantive nature of the *Miller*

rule.[10] Because *Miller* mandates consideration of specific individual factors and an expansion of the range of sentencing options for juveniles convicted of homicide, it must apply retroactively.

4. *Miller* Is Based Upon Precedents Which Have Been Applied Retroactively

Miller's prohibition on sentencing juveniles to mandatory life without parole is drawn from two strands of this Court's precedent, both of which have been applied retroactively to defendants on collateral

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[10] Indeed, post-*Miller*, not only are mandatory juvenile life without parole statutes invalid, even discretionary juvenile life without parole sentences are constitutionally suspect if the sentencer failed to fully consider relevant aspects of the defendant's youth. *See, e.g., State v. Long*, 8 N.E.3d 890, 898-99 (Ohio 2014) (granting resentencing in a discretionary juvenile life without parole sentence, noting "[a]lthough *Miller* does not require that specific findings be made on the record, it does mandate that a trial court consider as mitigating the offender's youth and its attendant characteristics before imposing a sentence of life without parole."); *Aiken v. Byars*, 765 S.E.2d 572, 577 (S.C. 2014) (applying Miller retroactively to discretionary juvenile life without parole sentences, noting "whether their sentence is mandatory or permissible, any juvenile offender who receives a sentence of life without the possibility of parole is entitled to the same constitutional protections afforded by the Eighth Amendment's guarantee against cruel and unusual punishment"), *cert. denied*, 135 S. Ct. 2379 (2015); *State v. Riley*, 110 A.3d 1205, 1213 (Conn. 2015) (holding "that the dictates set forth in *Miller* may be violated even when the sentencing authority has discretion to impose a lesser sentence than life without parole if it fails to give due weight to evidence that *Miller* deemed constitutionally significant before determining that such a severe punishment is appropriate."), *appeal docketed*, No. 14-1472 (U.S. June 16, 2015).

review. The first strand consists of cases establishing "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller*, 132 S. Ct. at 2463. *Roper* and *Graham*, which banned the juvenile death penalty and life without parole sentences for juveniles convicted of non-homicide offenses, respectively, based on the reduced culpability of juveniles, are included in this set of cases. *See also Atkins*, 536 U.S. at 304 (prohibiting execution of mentally retarded defendant). These cases have been applied retroactively.[11]

The second strand includes cases "prohibit[ing] mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." 132 S. Ct. at 2463. *See also Woodson*, 428 U.S. at 280 (banning mandatory death sentences in most circumstances); *Lockett*, 438 U.S. at 586 (holding that sentencer must be permitted to consider mitigating circumstances before imposing the death penalty); *Eddings*, 455 U.S. at 117 (requiring state courts to consider all mitigating evidence before imposing the death penalty). The holdings requiring individualized

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[11] *See, e.g.*, *Horn v. Quarterman*, 508 F.3d 306, 307–08 (5th Cir. 2007) (noting retroactive application of *Roper*); *LeCroy v. Sec'y, Florida Dep't of Corr.*, 421 F.3d 1237, 1239–40 (11th Cir. 2005) (same); and *In re Moss*, 703 F.3d 1301, 1302 (11th Cir. 2013) (holding *Graham* applies retroactively to cases on collateral review); *In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (holding *Graham* was made retroactive on collateral review); *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012) (*Atkins*); *Black v. Bell*, 664 F.3d 81 (6th Cir. 2011) (*Atkins*).

sentencing in capital cases were also applied retroactively.[12]

In knitting these strands together, this Court noted that just as "death is different, children are different too." *Miller*, 132 S. Ct. at 2470 (internal quotation marks omitted). Because *Miller* is premised on these two doctrinal strands – in both categorically banning mandatory sentences of life without parole for juveniles and requiring individualized consideration before discretionary imposition of life without parole on juveniles – *Miller* should also be applied retroactively. As Justice O'Connor summarized in *Tyler v. Cain*,

> [I]f we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review.

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[12] *See, e.g.*, *Songer v. Wainwright*, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc) (per curiam) (applying *Lockett* retroactively); *Dutton v. Brown*, 812 F. 2d 593, 599 n.7 (10th Cir. 1987) (same); *Harvard v. State*, 486 So. 2d 537, 538-39 (Fla. 1986) (same), *cert. denied*, 479 U.S. 863 (1986); *Riley v. Wainwright*, 517 So. 2d 656, 657 (Fla. 1987) ("*Lockett* clearly is retroactive."); *Shuman v. Wolff*, 571 F. Supp. 213, 216 (D. Nev. 1983) (*Eddings* applied retroactively), *aff'd*, 791 F.2d 788 (9th Cir. 1986), *aff'd sub nom. Sumner v. Shuman*, 483 U.S. 66 (1987); *Thigpen v. Thigpen*, 926 F. 2d 1003, 1005 (11th Cir. 1991) (applying *Shuman* retroactively). The rationale for holding these cases retroactive is similarly applicable here.

Tyler v. Cain, 533 U.S. 656, 668–69 (2001) (O'Connor, J., concurring).

B. Alternatively, *Miller* Is A "Watershed Rule" Under *Teague*

Assuming *arguendo* the rule announced in *Miller* is deemed procedural, *Miller* must still be applied retroactively as it would satisfy *Teague*'s second exception, which includes "watershed rules of criminal procedure" and "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313. To be "watershed[,]" a rule must first "be necessary to prevent an impermissibly large risk" of inaccuracy in a criminal proceeding, and second, "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (internal citations omitted).[13]

Miller satisfies both requirements. First, mandatory life without parole sentences cause an "impermissibly large risk" of *inaccurately* imposing the harshest sentence available for juveniles.

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[13] The *Tate* dissent also found that "the *Miller* decision established a 'watershed' rule of criminal procedure." *Tate*, 130 So. 3d at 847 (Johnson, C.J., dissenting). The *Tate* dissent noted that "[t]he *Miller* Court's holding makes clear that these considerations [of youth] are so paramount that, if not made, and a sentence of life imprisonment is mandatorily imposed, the state violates the individual's Eighth Amendment right to be free from cruel and unusual punishment. In my view, this rule speaks to the profound alteration in our understanding of fairness in the sentencing of juvenile offenders." *Id.*

Whorton, 549 U.S. at 418.[14] This Court held that sentencing juveniles to "that harshest prison sentence" without guaranteeing consideration of their "youth (and all that accompanies it) poses too great a risk of disproportionate punishment." *Miller*, 132 S. Ct. at 2469. The automatic imposition of this sentence with no opportunity for individualized determinations precludes consideration of the unique characteristics of youth – and of each individual youth – which make them "constitutionally different" from adults. *Miller*, 132 S. Ct. at 2464. This Court's finding that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon" means that many defendants currently serving such sentences were likely sentenced inaccurately. *Id.* at 2469. Mr. Montgomery was sentenced well before the emergent research on adolescent development came to inform this Court's rulings in *Roper*, *Graham* and *Miller*. Of course, even if the research had been available, the mandatory nature of the then-sentencing statute would have prevented the introduction of any of that research in his individual case. If *Miller* is not applied retroactively, Mr. Montgomery will never have an opportunity to present essential, constitutionally relevant evidence deemed a prerequisite by this Court to an accurate sentencing determination.

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[14] The Supreme Court has recognized that sentencing is a critical component of the trial process, and thus directly affects the accuracy of criminal trials. *See, e.g., Witherspoon v. Illinois*, 391 U.S. 510, 523 n.22 (1968) (retroactively applying a decision on a jury selection process that related to sentencing because it "necessarily undermined 'the very integrity of the process' that decided the [defendant's] fate.") (internal citation omitted).

Second, by requiring that, at a minimum, specific factors be considered before a court can impose a life without parole sentence on a juvenile, *Miller* changes the bedrock procedural elements necessary to assure the constitutional fairness of such a proceeding. *See Id.* at 2469 (requiring sentencing judges "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."). *Miller* has "effected a profound and sweeping change," *see Whorton*, 549 U.S. at 421 (internal quotation marks omitted), by simultaneously striking down sentencing schemes for children in twenty-nine jurisdictions. *See Miller*, 132 S. Ct. at 2471. In comparison, the quintessential "watershed" right to counsel announced in *Gideon* changed the law in only fifteen states. Brief for the State Government *Amici Curiae*, at p. 2, *Gideon v. Cochran*, 372 U.S. 335 (1963).

Justice Harlan noted in *Mackey* that "time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." *Mackey*, 401 U.S. at 693 (Harlan, J., concurring). *Roper*, *Graham* and now *Miller* illustrate the accuracy of Justice Harlan's prediction: changes in our understanding of youth have changed the "bedrock" of juvenile criminal process, leading to a "profound and sweeping" reshaping of the sentencing of juvenile offenders. *Miller* constitutes a watershed rule.

II. THE INTEREST IN ENSURING THAT NO JUVENILE IS INCARCERATED PURSUANT TO AN UNCONSTITUTIONAL MANDATORY LIFE WITHOUT PAROLE SENTENCE OUTWEIGHS A STATE'S INTEREST IN FINALITY

By setting narrow limits on the retroactive application of a new constitutional rule, this Court in *Teague* gave full weight to considerations of finality. *Teague*, 489 U.S. at 309. However, finality and repose cannot block the application of new constitutional commands in all cases. In *Teague*, this Court understood that determinations of retroactivity involve balancing the justice concerns of newly announced constitutional rulings with finality concerns and resolving the "tension between justice and efficiency." *Wainwright v. Sykes*, 433 U.S. 72, 115-16 (1977). In some circumstances, like those reflected in the *Teague* exceptions, the "principles of finality and comity 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" *Sawyer v. Whitley*, 505 U.S. 333, 351 (1992) (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)). Because of the strong concern for justice reflected in this Court's rejection of mandatory life without parole for juveniles, and the weakened concern for efficiency in a sentencing context, finality should not pose a barrier to retroactive application of *Miller*.

In *Mackey*, Justice Harlan expressed the concern that, a challenge to a prior conviction years or decades later may require courts to "relitigate facts buried in the remote past through presentation of witnesses

whose memories of the relevant events often have dimmed," resulting in subsequent verdicts no more accurate than the first. *Mackey*, 401 U.S. at 691 (Harlan, J., concurring). *See also* Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 Wake Forest J.L. & Pol'y 151, 167, 170 (2014) [hereinafter Berman, *Finality*] (noting the "fear that any new review or reconsideration of backward-looking factual determinations of guilt made during a trial will be costly and inefficient, will be less accurate, and will raise questions about the accuracy and efficacy of criminal trials generally.").

However, when a sentence, rather than an underlying conviction, is the subject of a new rule sought to be applied retroactively, the concern for finality should be accorded less weight. *See Carrington v. United States*, 503 F.3d 888, 901 (9th Cir. 2007) (Pregerson, J., concurring in part and dissenting in part) ("The interest in repose is lessened all the more because we deal not with finality of a *conviction*, but rather the finality of a *sentence*. There is no suggestion that [the defendants] be set free or that the government be forced to retry these cases. The district court asks only for an opportunity to re-sentence in accordance with the Constitution."). A sentencing hearing, particularly for a juvenile, is more "forward-looking," and includes consideration of the defendant's characteristics and the possibility of rehabilitation. The sentencing decision is not a binary finding of guilt or innocence, but "what to do with the convicted criminal in light of his, the victim['s], and society's needs." Berman, *Finality* at 169. Further, finality-related concerns about accuracy are *served* in the immediate context of mandatory life without

parole sentences, where there was never an opportunity for the judge (or jury) to impose the ultimate juvenile sentence based on the particular facts and circumstances of the case and the offender; applying *Miller* retroactively will actually *increase* the accuracy and proportionality of juvenile sentences.[15]

III. THIS COURT HAS JURISDICTION TO DECIDE THE CLAIMS AND ISSUES IN THIS CASE

This Court has asked the parties, as well as Court-appointed Amicus Counsel [hereinafter "Amicus Against Jurisdiction"], to address whether the Court has jurisdiction to consider the case before it. The analysis of Supreme Court jurisdiction is straightforward. First, does the claim meet the statutory requirements for jurisdiction? If yes, then second, was the case decided below on an independent and adequate state ground? In Mr. Montgomery's case, there can be no dispute that his claim meets this Court's jurisdictional requirements. That leaves only the second question – whether there are independent and adequate state grounds for the decision below.

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[15] Implicit in this Court's holding in *Miller* is the determination that mandatory life without parole sentences for juveniles were likely improper and disproportionate. As *Graham* and *Miller* found that life without parole for juveniles is "akin to the death penalty," *Miller*, 132 S. Ct. at 2466, this Court's emphasis on the importance of accuracy in capital cases should similarly apply in this matter. *See California v. Ramos*, 463 U.S. 992, 998-99 (1983) (the Constitution requires "a correspondingly greater degree of scrutiny of the capital sentencing determination"); *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993) ("the Eighth Amendment requires a greater degree of accuracy . . . than would be true in a noncapital case").

The underlying claim in this case is that Louisiana is unconstitutionally incarcerating Mr. Montgomery in violation of the Eighth and Fourteenth Amendments to the United States Constitution. That constitutional claim is based on *Miller* where this Court held:

> [A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

132 S. Ct. at 2475.

Mr. Montgomery was sentenced to life without the possibility of parole under a sentencing structure that is now unconstitutional in light of *Miller*. All necessary procedural requirements to create jurisdiction before this Court have been met. However, Louisiana imposed a bar to the consideration of this claim by asserting that this Court's modern retroactivity jurisprudence, as set forth in *Teague v. Lane*, 489 U.S. 288 (1989) bars

consideration of the underlying constitutional claim.[16] The bar imposed by Louisiana, however, is not

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[16] Ironically, the history of this Court's modern retroactivity jurisprudence overlaps with the history of Mr. Montgomery's case. When Mr. Montgomery's case was first working its way through the courts nearly five decades ago, federal law was evolving rapidly regarding the rights of criminal defendants in state proceedings. This Court was announcing new substantive rules of criminal procedure to apply in both federal and state criminal trials. This extension of federal constitutional rights to state court defendants was a byproduct of this Court's incorporation doctrine, whereby the majority of the first eight amendments to the Constitution were made applicable to the states through the due process clause of the Fourteenth Amendment.

At the time of Mr. Montgomery's trial, this process of incorporation was in full swing. In 1961, two years before Mr. Montgomery was arrested and charged with murder, this Court first applied the Fourth Amendment exclusionary rule to the states through the Fourteenth Amendment's due process clause. *Mapp v. Ohio*, 367 U.S. 643 (1961). In 1962, one year before the underlying offense occurred, this Court for the first time allowed a state inmate to raise a claim of cruel and unusual punishment under the Eighth Amendment. *Robinson v. California*, 370 U.S. 660 (1962). In 1963, the year of Mr. Montgomery's arrest, this Court extended the Sixth Amendment right to counsel to state inmates in *Gideon v. Wainwright*, 372 U.S. 335 (1963). In 1964, the year of Mr. Montgomery's first trial, this Court announced the incorporation of the Fifth Amendment's compelled testimony clause to the states. *Malloy v. Hogan*, 378 U.S. 1 (1964). Finally, one year after Mr. Montgomery's trial, in 1965, this Court incorporated the Sixth Amendment right to confront adverse witnesses. *Pointer v. Texas*, 380 U.S. 400 (1965).

Inevitably, this expansion of the federal constitutional rights of state criminal defendants and inmates required states to confront whether and when to apply these rulings to individuals already convicted and sentenced. In response, this Court developed the first retroactivity doctrine for the application of new federal rules in *Linkletter v. Walker*, 381 U.S. 618 (1965), which involved the retroactivity vel non of the Fourth

"independent and adequate." *See Klinger v. Missouri*, 80 U.S. 257, 263 (1871) (where the record indicates the state ground for its decision is not independent or adequate, "it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.").

Amendment exclusionary rule announced in *Mapp v. Ohio*. The Court concluded, "we are neither required to apply, nor prohibited from applying, a decision retrospectively." *Linkletter*, 381 at 629. After considering the jurisprudential basis for the newly required exclusionary rule under the Fourth Amendment, as well as the impact of retroactive application on state justice systems, this Court determined that it was "not able to say that the *Mapp* rule require[d] retroactive application." *Id.* at 640.

While *Linkletter* provided states with a new analytical framework for determining when to apply new constitutional requirements retroactively, states' participation in the retroactivity analysis in no way transformed the question of retroactivity of new constitutional rules from a federal question to a state decision.

In any event, *Linkletter* ultimately proved inadequate to address the myriad retroactivity questions arising from this Court's articulation of new rules. *See Teague*, 489 U.S. at 303 (discussing dissatisfaction with the *Linkletter* standards). In *Teague*, this Court crafted a new analytic path by which all new constitutional rules would be applied to all defendants on direct appeal, but "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310 (emphasis added). *Teague* unambiguously establishes a federal rule governing the applicability of federal constitutional rules in state courts. That state courts themselves may analyze the applicability of new federal rules under *Teague* does not make their ruling a state-based determination. Rather it makes such a ruling reviewable in federal courts, and in particular by this Court, which must have the final say on the retroactive application of federal constitutional claims.

See also, Michigan v. Long, 463 U.S. 1032 (1983) (holding that federal jurisdiction exists to review state court decision if that decision is based upon or intertwined with federal law). Therefore, this Court has jurisdiction to resolve Mr. Montgomery's claim of unconstitutional confinement and all issues collateral to that underlying constitutional claim.

A. All Necessary Prerequisites To Creating Jurisdiction In This Court Have Been Satisfied

From the earliest days of our constitutional democracy, this Court's jurisdiction over a case such as Mr. Montgomery's has been clear. During the turbulent period of framing between the Articles of Confederation and the adoption of our Constitution, the issue of Supreme Court jurisdiction was vetted, *inter alia*, in The Federalist No. 82:

> What relation would subsist between the national and State courts in these instances of concurrent jurisdiction? I answer that an appeal would certainly lie from the latter to the Supreme Court of the United States. The Constitution in direct terms gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. *The objects of appeal, not the tribunals from which it is to be made, are alone contemplated.* From this

> circumstance, and from the reason of the thing, it ought to be construed to extend to the State tribunals. Either this must be the case or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor.

The Federalist No. 82, at 493-94 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

Congress codified this view in its earliest explication of United States Supreme Court jurisdiction in the Judiciary Act of 1789. Since that early enactment, this Court has had jurisdiction to hear claims from state courts implicating violations of the Federal Constitution. 1 Stat. 85 (1789). Congress, in enacting Section 25 of that Act, recognized the jurisdiction of this Court applied whenever "a final judgment or decree" of the "highest court of law or equity of a State" decided "against the validity" of any federal constitutional, statutory or treaty provision. *Id.*[17] That original grant of jurisdiction has survived, with some minor textual changes, to this day. As set forth in current 28 U.S.C. § 1257:

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[17] For the past 150 years, this Court has had explicit jurisdiction over claims that a prisoner sentenced by a state court was being held in violation of the Constitution of the United States, and over 70 years ago that power was extended to collateral proceedings on habeas review. *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996) (citing *Waley* v. *Johnston*, 316 U.S. 101 (1942) (per curiam); *Brown* v. *Allen*, 344 U.S. 443 (1953)).

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of the United States.

The power of this Court to consider Mr. Montgomery's claim is further supported by the plain language of 28 U.S.C. § 2241. That statute allows this Court to grant a writ of habeas corpus when a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). And this Court's jurisdictional power to consider writs of habeas corpus from prisoners unconstitutionally sentenced in state court proceedings, like Mr. Montgomery, is specifically granted in 28 U.S.C. § 2254: "The Supreme Court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only *on the ground that he is in custody in violation of the Constitution* or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). As discussed above, Mr. Montgomery's claim is that the State of Louisiana is holding him contrary to the dictates of the Eighth and Fourteenth Amendments, as articulated in *Miller*. Neither the Respondent nor the Amicus Against Jurisdiction dispute the fundamentally federal nature of that claim.

In addition to subject matter jurisdiction, all procedural requirements for this Court's jurisdiction over Mr. Montgomery's claim have likewise been satisfied. Mr. Montgomery presented his federal *Miller* claim to the state courts for adjudication on the merits. *See* J.A. 8-24. The state district court that heard this claim barred the application of *Miller* to Mr. Montgomery's case, citing *Teague v. Lane*, 489 U.S. 288 (1989) and a federal Fifth Circuit Court of Appeals case, *Craig v. Cain*, No. 12-30035, 2013 WL 69128 (5th Cir. Jan. 4, 2013) (per curiam), which denied retroactive application of *Miller* under *Teague*. *See* Petition for Writ of Certiorari, App. 1-2. The Louisiana Supreme Court affirmed the holding of the District Court and cited *State v. Tate*, 130 So. 3d 829 (La. 2014) which applied the federal *Teague* retroactivity doctrine to *Miller* claims in Louisiana and ruled *Miller* not retroactive. *See Montgomery*, 141 So. 3d at 264. Mr. Montgomery's federal constitutional claim was presented to and considered by the state courts, including the Louisiana Supreme Court. Mr. Montgomery's underlying constitutional claim of illegal incarceration in violation of the Constitution was fully exhausted in the Louisiana state courts.

B. The Retroactivity Bar Imposed By Louisiana Is Not An Adequate And Independent State Ground

A state may defeat jurisdiction over an otherwise cognizable claim in this Court by deciding the claim on an independent and adequate state ground. However, whether a state court's reasoning and holding "are based on a federal right or are merely of local concern is itself a federal question on which this

Court has the last say." *Angel v. Bullington*, 330 U.S. 183, 189 (1947). In Mr. Montgomery's case, Louisiana relied entirely on federal law, providing no independent and adequate state ground for the decision.

In *State v. Tate*, the Louisiana Supreme Court was unequivocal in articulating the federal basis for its retroactivity analysis of *Miller*: "As we stated in *State ex rel. Taylor v. Whitley* the standards for determining retroactivity set forth in *Teague v. Lane* apply to 'all cases on collateral review in state courts.' Accordingly our analysis is directed by the *Teague* inquiry." *Tate*, 130 So. 3d at 834 (citations omitted). The state court then quoted extensively from this Court's ruling in *O'Dell v. Netherland*, 521 U.S. 151, 156-57 (1997), which had previously determined that the federal constitutional rule announced in *Simmons v. South Carolina*, 512 U.S. 154 (1994), was not retroactive under the federal retroactivity analysis. *Tate*, 130 So. 3d at 834-35. The *Tate* court's lengthy quote included several other cases decided by this Court.[18] Indeed, *Tate* relies exclusively on federal

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[18] *Tate* cited: *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997) (describing the steps in the *Teague* analysis regarding finality of conviction, new rules and exception); *Saffle v. Parks*, 494 U.S. 484, 488 (1990) (Courts must determine whether at the time of finality, the constitutional claim was "compelled by existing precedent"); *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) (describing the first *Teague* exception when "forbidding criminal punishment of certain primary conduct [and] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense"); *Graham v. Collins*, 506 U.S. 461, 478 (1993) (regarding the second exception for "watershed rules of criminal procedure"); and *Teague* itself. *Tate*, 130 So.3d at 834-35.

cases in addressing the retroactivity of *Miller*. *Id.* at 835-82.[19] Additionally, the *Tate* court provides "a summary of the post-*Teague* decisions in which the Supreme Court found a new rule would not qualify under the watershed exception." *Id.* at 840 n.3.[20]

In sum, *Tate* cited at least thirty federal cases to support its *Teague* analysis and *no* Louisiana statutes or rules of court. Further, only two Louisiana cases were cited by the *Tate* court in relation to the "*Teague* inquiry." The first, noted above, was *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292 (La. 1992), cited for the proposition that the Louisiana Supreme Court adopted *Teague* for its own retroactivity analysis. *See*

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[19] The additional federal cases cited by the *Tate* court in the body of the opinion are, in order of appearance: *Whorton v. Bockting*, 549 U.S. 406 (2007); *Shriro v. Summerlin*, 542 U.S. 348 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002); *Craig v. Cain*, No. 12-30035, 2013 WL 69128 (5th Cir. Jan. 4, 2013); *Ware v. King*, No. 5:12cv147-DCB-MTP, 2013 WL 4777322 (S.D. Miss. Sept. 5, 2013); *In re Morgan*, 713 F.3d 1365 (11th Cir. 2013); *Bousley v. United States*, 523 U.S. 614 (1998); *Espinosa v. Florida*, 505 U.S. 1079 (1992); *Sawyer v. Smith*, 497 U.S. 227 (1990); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Tyler v. Cain*, 533 U.S. 656 (2001); *Gideon v. Wainwright*, 372 U.S. 355 (1963); *Abdul-Khabir v. Quarterman*, 550 U.S. 233 (2007), *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978); and *Beard v. Banks*, 542 U.S. 406 (2004). *See Tate*, 130 So. 3d at 835-41.

[20] In addition to the federal cases cited in the body of the opinion, the *Tate* court further relies on the following United States Supreme Court cases to impose a retroactivity bar in Mr. Montgomery's case: *Caspari v. Bohlen*, 510 U.S. 383 (1994); *Gray v. Netherland*, 518 U.S. 152 (1996); *Mills v. Maryland*, 486 U.S. 367 (1988); *Butler v. McKellar*, 494 U.S. 407 (1990); *Arizona v. Roberson*, 486 U.S. 675 (1988); *Gilmore v. Taylor*, 508 U.S. 333 (1993); and *Goeke v. Branch*, 514 U.S. 115 (1995). *See Tate*, 130 So. 3d at 839 n.3.

Tate, 130 So. 3d at 834. The second Louisiana case cited was a lower court decision that relied entirely on a federal court decision regarding the retroactivity of *Miller*. *See id.* at 841 (citing *State v. Huntley*, 118 So. 3d 95, 103 (La. Ct. App. 2013)) (adopting the holding of *Craig*, 2013 WL 69128, at *2, that *Miller* is not retroactive under *Teague*).

Amicus Against Jurisdiction argues that, because the state had the power, though unexercised, to craft an independent basis for its decision, the state's failure to craft and assert an independent and adequate ground for a decision is itself an independent ground. *See* Brief of Amicus Against Jurisdiction at 10-13. This argument is not supported by the plain language or reasoning of the Louisiana Supreme Court's retroactivity decisions.

In making its argument, Amicus Against Jurisdiction relies on the Louisiana Supreme Court's observation that it could create a state-based bar to the consideration of Mr. Montgomery's claim. This may be possible in certain narrow circumstances, but is irrelevant here. The Louisiana Supreme Court *chose* to adopt *Teague* standards for retroactivity wholesale and without any independent doctrinal development: "We . *adopt the* Teague *standards* for all cases on collateral review in our state courts." *Whitley*, 606 So. 2d at 1296. The Louisiana Supreme Court recognizes it *could have* fashioned an independent and adequate state retroactivity doctrine, but has consistently chosen not to do so.

Amicus Against Jurisdiction compounds this error by arguing that *Michigan v. Long*, 463 U.S. 1032

(1983) does not apply because the state court might have done something other than what it did. *Long* held that jurisdiction in this Court would be allowed when "a state court decision fairly appears to rest primarily on federal law or to be interwoven with the federal law." *Long*, 463 U.S. at 1040. But Amicus Against Jurisdiction contends that because a state court recognizes that it is not actually bound by, but rather *chooses* to be bound by, federal law, that "choice" converts a wholly federal analysis to an independent state ground.

The plain meaning of the referenced Louisiana Supreme Court language undercuts this argument. In *Whitley*, the court stated: "We adopt the *Teague* standards for all cases on collateral review...." 606 So. 2d at 1296. The *Whitley* court's acknowledgement that it was not bound to follow *Teague*, coupled with its overt decision to do just that, was not a statement of independence, but rather an explanation for its abandonment of its prior, perhaps independent, retroactivity jurisprudence based on *Linkletter v. Walker*, 381 U.S. 618 (1965). *See Whitley*, 606 So. 2d at 1297. The state court, in deciding not to take an independent path, cited the dissenting opinion in yet another federal case as the basis for turning away from an independent state ground of analysis. *Id.* (citing *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring)). Having patently *rejected* an independent and adequate analysis, the *Whitley* court held: "Accordingly, we now adopt Justice Harlan's views on retroactivity, as modified by *Teague* and subsequent decisions, for all cases on collateral review in our state courts." *Id.* The recognition of its inherent power to act independently was only a

prelude to its adoption of *this* Court's reasoning and precedents without alteration.

Amicus Against Jurisdiction attempts to make this overt rejection of an independent state-based analysis into some version of preclusive independent state grounds. This reasoning obliterates the independent and adequate grounds jurisprudence of this Court. If that argument were followed, every state invocation of federal law, rules, opinions and perhaps the Constitution itself would become the basis of an independent *state* ground where the state might have the power, though not exercised, to do otherwise. This "woulda, coulda, shoulda"[21] argument demonstrates the *lack of independence* of the state court's ruling. The Louisiana court recognized that it had the power to act independently, but instead created a wholly *dependent* basis for denying Mr. Montgomery's federal constitutional claim. If the argument of Amicus Against Jurisdiction were to prevail, the admonition in The Federalist No. 82 will come to pass: "[T]he judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor" – and every state court. *See* The Federalist No. 82 at 494.

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[21] "All the Woulda-Coulda-Shouldas / Layin' in the sun, / Talkin' bout the things / They woulda-coulda-shoulda done... / But those Woulda-Coulda-Shouldas / All ran away and hid / From one little *did*." Shel Silverstein, *The Woulda-Coulda Shouldas*, *in* Falling Up, at 65 (1996).

C. This Court's Retroactivity Decisions Create A Floor, But Not A Ceiling, For Application Of Federal Constitutional Claims

Jurisdiction in this Court is also established because the retroactivity analysis set forth in *Teague* establishes a floor, but not a ceiling, for new constitutional rules announced by this Court. A determination by this Court that a new rule need not be applied retroactively does not "constrain[] the authority of state courts to give *broader* effect to new rules of criminal procedure than is required by that opinion," *Danforth v. Minnesota*, 552 U.S. 264, 266 (2008) (emphasis added). However, states may not evade application of a new rule once decisions of this Court establish that it is retroactive.[22] The *Teague* standard arises under "this Court's power to interpret the federal habeas statute" and "to adjust the scope of the writ in accordance with equitable and prudential considerations." *Id.* at 278. States are free to go further than the Court in applying new rules retroactively because states may provide broader retroactive relief "by enacting appropriate legislation or by judicial interpretation of its own Constitution." *Id.* at 288.

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[22] In direct opposition to this Court's holding in *Danforth*, Amicus Against Jurisdiction argues that, for Mr. Montgomery to prevail, retroactivity decisions of this Court must be both floor *and* ceiling such that states could never deviate from this Court's retroactivity decisions, even when this Court decides retroactive application is not required. Brief of Amicus Against Jurisdiction at 20-22.

However, states must still abide by the "'minimum federal requirements'" articulated by this Court. *Id.* at 287 (quoting *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 102 (1993)); *see also McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco, Dep't of Bus. Regul.*, 496 U.S. 18, 51–52 (1990). This Court has established that the Supremacy Clause does not allow states to deny remedies for federal rights "by the invocation of a contrary approach to retroactivity under state law." *Harper*, 509 U.S. at 100; *see also id.* at 102 ("State law may provide relief beyond the demands of federal due process, but under no circumstances may it confine petitioners to a lesser remedy.") (internal citations omitted); *Am. Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167, 178–79 (1990) (plurality opinion) ("[F]ederal law sets certain minimum requirements that states must meet but may exceed in providing appropriate relief."). If a new rule falls under a *Teague* exception and is held to apply retroactively, states cannot evade retroactive application by creating a higher bar to retroactivity based on state law.

Allowing states to elude *Teague*'s floor would violate the "basic due process" rights underlying *Teague*. 489 U.S. at 313; *see also Mackey*, 401 U.S. at 692–93 (Harlan, J., concurring in part and dissenting in part). This unacceptable loophole would undermine the authority of the Constitution and allow states to violate the constitutional rights of their citizens without redress.

It would also prevent consistent application of constitutional rights to similarly situated defendants, leaving the articulation of minimum constitutional protections dependent on the vagaries of state law. *See*

Teague, 489 U.S. at 315 ("[T]he harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment hardly comports with the ideal of administration of justice with an even hand.") (internal quotation marks omitted).

Although defendants in different states may still be treated differently when a state chooses to go beyond *Teague* and provide greater relief, that additional relief is a *state* right rather than a federal right. "With faithfulness to the constitutional union of the States, [this Court] cannot leave [entirely] to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Chapman v. California*, 386 U.S. 18, 21 (1967). Because federal law sets a minimum floor for retroactive application of this Court's constitutional decisions, this Court must ensure that a minimum level of relief is available to all prisoners impacted by a new rule.[23] In this case, Louisiana cannot assert an

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[23] This Court has repeatedly recognized that states are free to provide more generous protections than federal law requires. *See, e.g., Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("a State is free as a matter of its own law to impose greater restrictions [on] police activity than those this Court holds to be necessary upon federal constitutional standards."); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (noting that this Court's precedents do not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."); *Cooper v. California*, 386 U.S. 58, 62 (1967) ("Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.").

independent state ground to deny retroactive application of *Miller*, as that would confine Petitioners like Mr. Montgomery to a "lesser remedy" than this Court has mandated.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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